



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 9th day of November, 2004

Served: November 9, 2004

In the matter of

U.S.-Brazil All-Cargo Services

**Joint Application of Atlas Air, Inc. and Polar
Air Cargo, Inc. for Transfer of Brazil
Exemption, Designation, Frequencies, and
Frequency Dormancy Waiver**

Docket OST-2003-16690

Docket OST-2004-17363

ORDER TO SHOW CAUSE

Summary

By this order, we tentatively select Arrow Air and allocate five weekly round-trip frequencies to Arrow to provide scheduled all-cargo service between the United States and Brazil. We have also tentatively decided to award backup authority to Amerijet International.

In addition, by this order, we have tentatively decided to authorize Polar Air Cargo to operate U.S.-Brazil all-cargo services in place of Atlas Air.

We will afford interested parties 10 calendar days from the service date to file objections and 5 calendar days to file any answers to such objections.

Background

Under the Air Transport Agreement between the United States and Brazil, four U.S. carriers may be designated to operate scheduled all-cargo services. These carriers, collectively, may operate a maximum of 24 round-trip all-cargo wide-body frequencies per week between the United States and Brazil.¹ Federal Express Corporation, Polar Air Cargo, United Parcel Service, and Atlas Air

¹The agreement expresses the number of flights as units representing wide-body freighters. If a carrier chooses, it may substitute two flights using narrow-body aircraft for any of the wide-body frequencies it holds. The agreement provides that designated airlines may operate from a point or points in the United States via intermediate points, to Manaus, Brasilia, Rio de Janeiro, Sao Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador de Bahia, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile.

are the four carriers now designated to provide all-cargo services in the market. Federal Express is allocated 5 weekly frequencies, Polar 4 weekly frequencies, UPS 4 weekly frequencies, and Atlas 10 weekly frequencies. One frequency is currently unallocated.

Two of these carriers -- Polar and Atlas -- reached an agreement, under which they would be owned by the same company but would continue to operate as two separate airlines. By Order 2001-12-15, the Department tentatively decided to approve, with the exception of Polar's Brazil designation and frequencies, a *de facto* transfer of Polar's certificate and exemption authority, together with related frequency allocations, to Polar under the control of Atlas Air Worldwide Holdings, the parent company of Atlas Air (Docket OST-01-10239). In tentatively deciding to exclude Polar's Brazil route authorities from the *de facto* transfer, the Department found that "we cannot tentatively conclude that, in this highly restricted market, the public interest would be better served by having two of the four designated airlines under single corporate control serve a market previously served by four unrelated airlines."

Order 2002-5-24 made final the Department's *de facto* route transfer decision and stated that the Department would institute a proceeding to reallocate Polar's Brazil designation and frequencies.² By Order 2002-6-20, the Department instituted a proceeding to select a carrier to replace Polar. By Order 2003-5-27, the Department made final its decision to select Evergreen International with Gemini Air Cargo as the backup carrier. Evergreen subsequently filed notice that it did not intend to inaugurate its proposed services. Under the terms of Order 2003-5-27, Evergreen's U.S.-Brazil authority expired, which activated the backup authority of Gemini. Subsequently, Gemini filed notice that it, too, did not intend to inaugurate its proposed services. Accordingly, the designation authorization and four frequencies previously awarded first to Evergreen and later to Gemini are now available to the Department for reallocation based on the terms of Order 2003-5-27.

As a separate matter, Federal Express advised the Department in Docket OST-2000-7559 that it had decided to surrender for reallocation one of its U.S.-Brazil all-cargo frequencies.

By Notice in Docket OST-2003-16690, the Department requested applications from all U.S. carriers interested in using (a) one U.S.-Brazil authorization to be designated as an all-cargo carrier, which is currently allocated on an interim basis to Polar; and (b) five U.S.-Brazil all-cargo frequencies (four frequencies that are temporarily allocated to Polar, and one frequency previously allocated to Federal Express that has been surrendered to the Department for reallocation).

Applications and Responsive Pleadings

Arrow Air and Amerijet International filed applications, answers, and replies.

Arrow proposes to provide service five days a week over various routings from Miami to Sao Paulo, Rio de Janeiro, and Manaus, Brazil, via Port of Spain (Trinidad). Amerijet proposes to use two-and-a-half wide-body frequencies to provide five narrow-body flights per week over various routings between Miami and Recife, Manaus, and Belem, Brazil, via Maracaibo (Venezuela), Port

²Under the terms of Order 2002-5-24, Polar's designation and four frequencies reverted to the Department for reallocation. However, Order 2002-5-24 granted Polar the right to continue using its prior U.S.-Brazil designation and four U.S.-Brazil frequencies on a temporary basis until the rights have been reallocated and the carrier receiving those rights begins service.

of Spain (Trinidad & Tobago), Georgetown (Guyana), Valencia (Venezuela), San Juan (Puerto Rico), and Barbados.³

See the attached exhibit for a summary of each applicant's proposal.

Position of the Parties

In support of its proposal, **Arrow** maintains that it alone will fully utilize all of the available frequencies, and provide service using wide-body aircraft. Arrow further argues that it has presented the only viable proposal in this case, and that it is committed and qualified to serve the Brazil market based on its experience and track record in providing charter service to Brazil. In this regard, Arrow states that it knows the markets it proposes to serve based on its experience in the charter market and has the facilities and capability available both in the U.S. and Brazil to handle the cargo that will be tendered on a scheduled basis, making its services more broadly and readily available to the shipping public.

In response, **Amerijet** maintains that since Arrow already provides extensive U.S.-Brazil all-cargo charter service, an award to Arrow in this case would not permit that carrier to do anything that it is not doing already. According to Amerijet, the charter service that Arrow currently provides would continue as scheduled service at the same frequencies, with the same aircraft, in the same city-pair markets. In this connection, Amerijet argues that there is no material difference between scheduled and charter service. Amerijet further argues that selecting Arrow would add more scheduled service of a type that is already abundant – wide-body freighter service in major city-pair markets. In this regard, Amerijet notes that other scheduled all-cargo carriers that focus on wide-body service in major markets are not currently using all of the frequencies allocated to them, and that Arrow's proposal is similar to the previous proposals of Evergreen and Gemini, both of which could not be implemented, thus leading to the current case.

In support of its proposal, **Amerijet** states that it intends to focus on developing secondary markets, including important fifth-freedom markets, and on integrating Amerijet's existing service with significant new terminal points in Brazil. According to Amerijet, the major U.S.-Brazil all-cargo markets are already receiving adequate service from incumbent carriers. Amerijet argues that its proposal is better suited to the current state of the U.S.-Brazil market, and that its narrow-body B-727 aircraft will allow it to respond to changes in demand more quickly than would be the case if it were operating larger equipment. In addition, Amerijet contends that its current terminal points in the Caribbean and South America (Puerto Rico, Guyana, Barbados, Trinidad, Curacao, and Venezuela) would be good "jumping off points" to expand its system into Brazil.⁴ Finally, Amerijet maintains that, as the market grows, it would expand its 2.5 frequency proposal to use all 5 available frequencies. In this connection, Amerijet states that it would provide "standby" wide-body bulk service in the Miami-Sao Paulo market on a wet-lease basis whenever the need arises.⁵

In response, **Arrow** maintains that an award to Amerijet would leave unused frequencies on the table because it proposes to use fewer than the five available frequencies. According to Arrow,

³Amerijet states that it would use the remaining 2.5 frequencies in the future by adding flights as the market grows and by entering into a wet-lease arrangement to provide wide-body service in the Miami-Sao Paulo market whenever the need arises.

⁴Amerijet application at 8.

⁵Amerijet application at 9.

Amerijet has not even begun the process of establishing service in the Brazil market as it has not operated any charter services to Brazil in the past year. Furthermore, Arrow maintains that the reason for limited service at Belem and Recife is that there is no industry based there. Arrow states that the only potentially significant item produced in Belem for air freight is the mango crop -- a seasonal product that could be more easily transported via Sao Paulo. Arrow argues that the only product of significance in Recife is fish, which is not farmed and therefore is not supportive of a steady, scheduled air cargo service. In evaluating Amerijet's proposal to serve less-developed markets, Arrow notes that the Department should take into account that it is more economical to transport cargo from markets such as Belem and Recife via the hubs of Sao Paulo and Rio de Janeiro where wide-body aircraft can be efficiently employed. Finally, Arrow notes that Amerijet would use smaller aircraft with less capacity.

Subsequent Developments: Atlas/Polar Filing

After applications and responsive pleadings were filed in this case, Atlas Air and Polar Air Cargo filed an application in Docket OST-2004-17363 requesting a transfer of Atlas' Brazil route authorities from Atlas to Polar. Specifically, Atlas/Polar (the Joint Applicants) request that the Department approve, or disclaim jurisdiction over, the transfer of Atlas' Brazil all-cargo designation, ten all-cargo frequencies, related dormancy waiver, and U.S.-Curitiba/Fortaleza (Brazil) extrabilateral exemption authority to Polar.

The Joint Applicants do not seek the transfer of Atlas' Brazil certificate authority or Atlas' Brazil exemption authority to serve Brazil. The Joint Applicants wish to retain Atlas' Brazil authority so that Atlas will be able to offer code-share only services. Furthermore, the Joint Applicants state that a transfer of Atlas' Brazil certificate authority to Polar is not necessary because, by Order 2002-5-24, the Department decided to permit Polar to retain its U.S.-Brazil certificate authority to be able to continue service until a successor to the route could commence service and, subsequently, to be able to implement services on a code-share only basis under the terms of the U.S.-Brazil bilateral agreement.

The Joint Applicants request that, following receipt of notification from the Joint Applicants, the Department (1) effectuate the transfer that has been approved and (2) send a diplomatic note to Brazil revalidating Polar's designation as one of the four U.S. carriers authorized to provide all-cargo services (in lieu of Atlas) in the U.S.-Brazil market and designating Atlas to provide code-share only service between the United States and Brazil.

In support of their request, the Joint Applicants state that the simplest and most expeditious procedural vehicle for completion of the U.S. regulatory process may be for the Department to disclaim jurisdiction over the proposed transfer of Atlas' designation, ten frequencies, dormancy waiver, and Curitiba/Fortaleza exemption authority. In this regard, the Joint Applicants note that the Department has disclaimed jurisdiction over intra-corporate route conveyances and reissued authority without making the route transfer findings otherwise required.

Responsive Pleadings

Arrow, Amerijet, and the Official Committee of Unsecured Creditors for the Atlas/Polar joint

holding company filed answers.⁶ Polar filed a reply.

Arrow and Amerijet state that they do not oppose the application provided that it does not affect the Brazil selection case at issue here. Arrow requests that if the Department acts favorably on the application, that the designation currently held by Atlas be cancelled to avoid any confusion as to the availability of a fourth designation. Furthermore, Arrow requests that a designation to provide code-share only service be issued to Atlas only if it is required under the bilateral agreement. For its part, Amerijet elaborates that it does not oppose the application provided that the Joint Applicants do not intend for the Department to reverse the decision it made to reclaim Polar's designation and frequencies for reallocation to another carrier.

In its reply, Atlas/Polar state that they have no intention to reclaim the designation and frequencies that are the subject of this case, or otherwise interfere with the processing of Arrow's and Amerijet's competing applications as Polar's designation and four frequencies have already reverted to the Department for reallocation. In addition, the Joint Applicants state that they do not object to clarifying through diplomatic channels that Atlas' designation will be limited to code-share only services. However, the Joint Applicants state that the Department needs to be careful not to disturb Polar's existing designation until the Joint Applicants are ready to effectuate the route transfer.

Carrier Selection Tentative Decision

We have tentatively decided to select Arrow and allocate it five weekly frequencies for all-cargo services in the U.S.-Brazil market.⁷ In addition, we have tentatively decided to award backup authority to Amerijet.

The available service opportunity and attendant frequencies represent valuable operating rights. These rights were obtained through negotiations in exchange for operating rights for Brazilian carriers, and the public interest favors full use of these limited-entry route rights. In addition, the designation and frequencies at issue here represent a valuable opportunity to maintain competition among four unrelated all-cargo carriers in the U.S.-Brazil market after the merger of two of the four designated carriers.

We believe that the record of the case supports the selection of Arrow for several reasons. First, it would maximize use of frequencies available under the bilateral. The record of this case shows that Arrow would serve Brazil using all five of the available wide-body frequencies. Amerijet, on the other hand, would use only two-and-a-half wide-body frequencies, converting them to provide five narrow-body flights per week to Brazil. While Amerijet has argued that it would "fully utilize" the available authority, we tentatively find that Amerijet would not, in fact, fully utilize the available frequencies. Amerijet states in its own proposal that two-and-a-half of the five available

⁶ After filing its answer, the Official Committee of Unsecured Creditors filed a motion to withdraw its comments in this case when Atlas and Polar emerged from bankruptcy. We grant the motion.

⁷ Since we are reallocating frequencies already being used, we tentatively find that our action here would not constitute a "major regulatory action" under the Energy Policy and Conservation Act of 1975, as defined by section 313.4(a)(1) of the Department's regulations. Based on officially noticeable data, we tentatively find that both applicants are fit, willing, and able to provide the proposed services. Both applicants have previously been found fit to provide scheduled air transportation of property and mail. (See Order 2002-7-31 for Arrow and Order 2002-3-21 for Amerijet.) No information has come to our attention that leads us to question the fitness of the applicants to conduct the foreign air transportation operations at issue here.

frequencies would only be used in the future “as demand increases” and through a wet lease with an unspecified wide-body carrier in the Miami-Sao Paulo market.⁸

Second, we believe that Arrow has the edge when comparing service proposals. The record shows that both applicants would serve from Miami and both carriers would serve Manaus in Brazil. The record also shows that Arrow would serve the major Brazil all-cargo markets of Sao Paulo and Rio de Janeiro. Amerijet, in contrast, would serve the secondary unserved markets of Belem and Recife. We recognize that there might be some public benefits resulting from Amerijet’s service to points that currently do not have U.S. carrier service. However, Amerijet acknowledges in its own application that its service points are “less developed markets” with relatively low traffic demand.⁹ In these circumstances, we tentatively are not persuaded from the record that the benefits of securing service at these two points would outweigh the broader range of benefits deriving from Arrow’s proposal.

Third, we believe that the selection of Arrow would maximize competition in the U.S.-Brazil all-cargo market. It would reinstitute competition among four unrelated airlines in the principal U.S.-Brazil all-cargo markets. Further, it will do so with the maximum number of frequencies permitted under the bilateral. In light of these findings, we tentatively conclude that Arrow’s proposal would provide greater public benefits than Amerijet’s proposal, and that selecting Arrow would best serve the public interest in this case.

In reaching our tentative conclusion here, we have carefully considered the arguments against Arrow’s proposal. However, we are not persuaded that any of these arguments warrants making a different selection in this case.

Contrary to assertions made by Amerijet, we believe that there is a material difference between scheduled and charter service, and we tentatively find that we should not substitute our judgment for that of Arrow’s management if Arrow has decided it wants to offer scheduled services in this market. Amerijet has also claimed that selecting Arrow would simply add more of the same type of wide-body service that is already abundant in the U.S.-Brazil market, and that incumbent carriers are not using all of their frequencies. In this regard, we note this case arose out of the need to replace Polar’s existing Brazil service. Our tentative decision here will not, in effect, add new wide-body service. Rather, our tentative decision here will replace Polar’s existing wide-body service with Arrow’s proposed wide-body service to ensure that four unrelated carriers are competing against one another to provide the best service to the shipping public. As to Amerijet’s argument that existing carriers are not using all of the frequencies allocated to them, we note that Polar, which would be replaced by Arrow, is currently using all of its frequencies.

Backup Award

We tentatively find, in the circumstances of this case, that it is in the public interest to have a backup carrier in place, if necessary, for immediate implementation of service in the event that the primary carrier does not inaugurate its proposed services. In this regard, we have tentatively decided to select Amerijet as backup to Arrow.

⁸Amerijet application at 7.

⁹Amerijet application at 5.

Atlas/Polar Tentative Decision

With respect to the issues raised by the application of Atlas and Polar, we have tentatively decided to authorize Polar to operate U.S.-Brazil all-cargo services in lieu of Atlas. Specifically, we have tentatively decided to (1) revoke Atlas' authority to be designated to provide all-cargo services in the U.S.-Brazil market and simultaneously grant Polar the authority to be designated in place of Atlas; (2) revoke Atlas' allocation of ten weekly U.S.-Brazil all-cargo frequencies and simultaneously grant Polar an allocation of ten frequencies in place of Atlas; (3) revoke Atlas' waiver of the dormancy condition through December 31, 2004, for four of its ten frequencies and simultaneously grant Polar a waiver through December 31, 2004, in place of Atlas; and (4) revoke Atlas' extrabilateral exemption authority to serve Curitiba and Fortaleza in Brazil and simultaneously grant Polar an extrabilateral exemption for Curitiba/Fortaleza.

The Atlas/Polar request is unopposed. Furthermore, our tentative decision here is consistent with the Department's previous decision to exclude Polar's Brazil designation and frequencies from the *de facto* Atlas/Polar route transfer. In that case, the Department made clear that the purpose of excluding Polar's Brazil route rights was to ensure that each of the four carriers providing all-cargo service in the U.S.-Brazil market is under separate corporate control and, therefore, competing against one another.

Our tentative decision here ensures that outcome. In addition, our tentative decision in this matter in no way alters the authority at issue, which is the reallocation of one designation and four frequencies formerly held by Polar. Atlas and Polar combined will retain one designation and ten frequencies as contemplated by the Department's previous decision in approving the *de facto* route transfer. In these circumstances, we tentatively find that it is in the public interest to grant Polar the authority to operate U.S.-Brazil all-cargo services in place of Atlas.

As requested by Atlas and Polar, our tentative decision will not immediately disturb the existing designation of Atlas. The Department's tentative decision grants the authority for Polar to be designated in place of Atlas. If and when our tentative decision is made final, a diplomatic note designating Polar in place of Atlas, and designating Atlas for code-share only services, will be sent to the Government of Brazil.

Terms, Conditions and Limitations

Consistent with our standard practice, we propose to issue an experimental five-year certificate of public convenience and necessity for the primary award to Arrow and a contingent certificate of one-year's effectiveness for the backup award to Amerijet. We will also impose a startup condition for each award. Arrow and Amerijet have stated that they would accept a startup condition.

Consistent with our standard practice, we have tentatively decided to require institution of service within 90 days after the effective date of the certificate to be issued. In addition, consistent with our standard practice, we propose that the frequencies allocated in this proceeding will be subject to our standard 90-day dormancy condition, wherein any frequencies not operated for a period of 90 days (once inaugurated) would be deemed dormant, except where service in the market is seasonal. Where seasonal services are at issue, however, a carrier must notify the Department that its operations are of a seasonal nature; otherwise, the dormancy condition would apply. Under the

dormancy condition, if any of the flights allocated are not used for a period of 90 days (once inaugurated), the frequency allocation with respect to each frequency would expire automatically and the frequency would revert to the Department for reallocation.¹⁰

ACCORDINGLY,

1. We tentatively select Arrow Air Cargo, Inc. for authority to provide U.S.-Brazil all-cargo services between Miami, Florida, on the one hand, and the co-terminal points Rio de Janeiro, Manaus and Sao Paulo, Brazil, on the other hand, via Port of Spain, Trinidad and Tobago, and for an allocation of five weekly round-trip frequencies for this service;
2. We tentatively select Amerijet International, Inc. for authority to provide U.S.-Brazil all-cargo services between Miami, Florida, on the one hand, and the co-terminal points Belem, Manaus, and Recife, Brazil, on the other hand, via Maracaibo and Valencia, Venezuela; Port of Spain, Trinidad and Tobago; Georgetown, Guyana; San Juan, Puerto Rico; and Barbados; and for an allocation of two-and-a-half weekly round-trip frequencies for this service, should its backup certificate become activated;
3. We tentatively revoke Atlas Air, Inc.'s authority to be designated to provide U.S.-Brazil all-cargo services and contemporaneously tentatively grant Polar Air Cargo, Inc. the authority to be designated in place of Atlas Air, Inc. to provide U.S.-Brazil all-cargo services;
4. We tentatively revoke Atlas Air Inc.'s allocation of ten weekly all-cargo frequencies to operate U.S.-Brazil services, and contemporaneously tentatively grant Polar Air Cargo, Inc. an allocation of ten weekly U.S.-Brazil all-cargo frequencies in place of Atlas;
5. We tentatively revoke Atlas Air, Inc.'s waiver through December 31, 2004, of the 90-day dormancy condition for four of its ten weekly all-cargo frequencies, and contemporaneously tentatively issue a waiver through December 31, 2004, of the 90-day dormancy condition for four of the ten frequencies allocated to Polar Air Cargo, Inc. in Paragraph 4;
6. We tentatively revoke Atlas Air, Inc.'s exemption authority to serve Curitiba and Fortaleza, Brazil, and contemporaneously tentatively grant an exemption to Polar Air Cargo, Inc. to serve Curitiba and Fortaleza, Brazil.
7. We direct any interested parties having objections to our tentative decisions set forth in this order and in ordering paragraphs 1 through 6 above, to file their objections with the Department, Dockets, U.S. Department of Transportation, 400 Seventh Street SW, Room PL-401, Washington, DC 20590, in the above-captioned dockets no later than 10 calendar

¹⁰As we have noted earlier, the frequencies allocated represent valuable rights obtained in exchange for rights to Brazilian carriers. Accordingly, we remind the selected carrier that the frequencies awarded are for weekly operations. A scheduled carrier may not bank frequencies from one week to the next. Failure to use the frequencies on a weekly basis will result in the forfeiture of the unused frequencies.

days from the date of service of this order; answers thereto shall be filed no later than 5 calendar days thereafter.¹¹

8. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action;¹² if no objections are filed we will deem all further procedural steps to be waived and will proceed to enter a final order awarding the authority proposed in this order; and
9. We will serve this order on the parties to the captioned docket of this order, the Brazilian Ambassador to the United States in Washington, DC, the Federal Aviation Administration, and the U.S. Department of State (Office of Aviation Negotiations).

By:

KARAN BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

¹¹The original filing should be on 8½" x 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system. In the alternative, filers are encouraged to use the electronic filing submission capability available through the Dockets/DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site.

¹²As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this order.

CARRIER PROPOSALS IN THE U.S.-BRAZIL ALL-CARGO SERVICE PROCEEDING, DOCKET OST-2003-16690:
ONE DESIGNATION AND FIVE FREQUENCIES

Applicant	Single-Plane Routing(s)	Weekly R/T Freqs.	Aircraft	Maximum Capacity per Flight	Start Date
Arrow	Various routings between Miami and Manaus, Sao Paulo, and Rio de Janeiro via Port of Spain	5	L-1011	125,000	Within 90 days of award
Amerijet	Various routings between Miami and Manaus, Belem, and Recife via Maracaibo (Venezuela), Port of Spain (Trinidad & Tobago), Georgetown (Guyana), Curacao, Valencia (Venezuela), San Juan (PR), and Barbados	2.5	B-727-200	58,000	Upon receipt of all government approvals

Amerijet states that it would use 2.5 wide-body frequencies to operate 5 weekly narrow-body flights under the frequency conversion provisions of the U.S.-Brazil agreement.

Amerijet states that it would use an additional 2.5 frequencies in the future as the market grows by entering into a wet-lease arrangement to provide wide-body service in the Miami-Sao Paulo market whenever the need arises.

Amerijet requests the Department to grant "scheduling flexibility" to use the frequencies differently as demand may change or develop